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BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKET SECTION

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AIR TRANSPORT ASSOCIATION OF AMERICA  
AGREEMENT RELATING TO LIABILITY  
LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-96-1607 - 5

With cross reference to:

INTERNATIONAL AIR TRANSPORT ASSOCIATION  
AGREEMENT RELATING TO LIABILITY  
LIMITATIONS OF THE WARSAW CONVENTION

Docket OST-95-232 - 32

RESPONSE OF THE VICTIMS FAMILIES' ASSOCIATIONS  
TO APPLICATION OF THE  
AIR TRANSPORT ASSOCIATION OF AMERICA  
FOR APPROVAL OF AGREEMENT, ANTITRUST  
IMMUNITY AND RELATED EXEMPTION RELIEF AND  
MOTION FOR LEAVE TO FILE A LATE PLEADING

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Dated: August 22, 1996

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

**AIR TRANSPORT ASSOCIATION OF AMERICA  
AGREEMENT RELATING TO LIABILITY  
LIMITATIONS OF THE WARSAW CONVENTION**

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Docket OST-95-232

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Pursuant to 14 C.F.R. 302.17, the Victims Families' Associations<sup>1</sup> respectfully move the Department of Transportation for leave to file a late pleadings and respectfully request that the within pleading be included in the above-captioned docket.

On behalf of its individual members, Victims Families' Associations make the following comments on the Application of the Air Transport Association of America (ATA) for Approval of Agreement, Antitrust Immunity and Related Exemption Relief and

1 This pleading is filed on behalf of the American Association for Families of KAL 007 Victims; the Families of Pan-Am 103 at Lockerbie, Scotland; and the Families of the TWA 800 Disaster. The undersigned acknowledges that not all families of the disaster may agree with the statements contained herein but assures the Department that one or more of the members of the Associations has retained the undersigned to express those views.

further request that the Department require modification of the proposed Agreement on Measures to Implement IATA Inter-carrier Agreement ("IPA") as more specifically set forth below.

## I. INTRODUCTION

The families of victims of air disasters which are governed by the Warsaw Convention<sup>2</sup> ("the Treaty") have a significant interest in the Application currently before the Department of Transportation because it effects the rights and remedies that families may have available in the future in the Treaty regime. Since the identity of future victims and their families cannot be known, it is incumbent on the families of the victims of past disasters to state their opinions on issues that may effect like-situated families in the future. The Victims Families' Associations note that there has been a failure at the governmental level to correct the low limitations of liability and the need for the claimants to prove willful misconduct in order to obtain compensation in excess of the limit of liability. The revisions of the Treaty and/or unilateral implementation of a passenger-financed administratively complex supplemental compensation plan have not succeeded. The Victims Families' Associations agree that the process proposed by ATA to obtain approval of the Department pursuant to Part 303 of the Department's Regulations and 49 U.S.C. §§ 41308 and 41309 and to obtain antitrust immunity is an

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<sup>2</sup> Convention for the Unification of Certain Rules relating to International Transportation by Air, October 12, 1929 49 Stat. 3000, T.S. 87C (1934).

appropriate vehicle to achieve ameliorative corrections of the current Treaty system. However, the Victims Families' Associations do not believe that the IPA adequately addresses all issues and that further modification of the IPA should be required.

## II. BACKGROUND

The Victims Families' Associations generally agree with the ATA recitation of the events leading up to the Application as background material. However, the Victim Families' Associations also remind the Department that, in its first Order granting discussion authority, the Department set out guidelines to govern any Agreement to improve the Warsaw system as follows:

[F]irst, with regard to passenger claims arising from international journeys ticketed in the United States, passengers should be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits and with measures of damages consistent with those available in cases arising in the United States in U.S. domestic air transportation; second, this coverage should be extended to U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States.<sup>3</sup>

The IPA does not fully achieve these goals and it is suggested that the ATA carriers be required to agree to provisions that effectuate these goals.

## III. SPECIFIC PROVISIONS

### A. Generally

The Victims Families' Associations' generally express approval of the ATA carriers' agreement to include in their conditions of

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<sup>3</sup> Order 95-2-44 at 3

carriage a special contract with the passengers and to expedite approval of the special contract. The Victims Families' Associations suggest that the proposed provisions do not significantly fulfill the stated purpose that the first Order granting discussion authority was meant to achieve, i.e., prompt and complete compensation on a strict liability basis with no passenger limits and extension of coverage to all U.S. citizens and permanent residents regardless of the place of purchase of the passenger ticket. Rather, the DOT should require ATA member carriers to specifically commit to the provisions that fulfill those goals as more specifically set forth below.

B. Paragraph (I)(2)

This Paragraph requires each participating carrier to relinquish any defense under Article 20(1) of the Convention with respect to that portion of the claim that does not exceed 100,000 SDRs. The Victim Families' Associations suggest that the policy announced by the DOT in its Order granting discussion Authority is unfulfilled by limiting waiver of the "all necessary measures" defense of Article 20(1) only to damages that do not exceed 100,000 SDRs. It is suggested that the Department require that the ATA Application be modified to require adoption of a provision such that the air carrier is absolutely liable to the claimants without regard to any Article 20(1) defense, i.e., that it be a one level source of liability.

Because one of the primary goals of the Department is to protect American citizens engaged in air transportation and because assessment of damages following injury or death necessarily involves the judicial systems worldwide, it is important that the Department understand the practical importance of ATA's proposal not to waive the defense of non-negligence for amounts in excess of 100,100 SDRs.

American tort law is a fault-based system. Its lawyers and judges are familiar with negligence concepts and the breadth of duty imposed on the air carrier to properly fulfill its duty to safely transport the passengers from point of origin to point of destination. To that end, it is highly unlikely that the distinction of the non-waiver of the defense of "all necessary measures" for amounts in excess of the first tier would have any significance to claims assessed in an American court.

The same is not true worldwide. The American common law negligence system is but one of a variety of judicial philosophies adhered to across the globe. It is suggested that in the vast majority of countries, the distinction between the waiver and non-waiver would be significant and would most likely result in a denial of compensation in excess of the first tier in many cases.

It is not the Department's function to comment on the validity or harshness of other countries' jurisprudence. It is, however, the Department's duty to address the concerns of American citizens and permanent residents. Therefore, it is critical that, if the Department permits the ATA carriers to maintain a non-waiver of

the Article 20(1) defense for amounts in excess of the first tier of recovery, it also require that venue be permitted in American courts for American citizens where personal jurisdiction can be maintained against the carrier in these courts. Only in this manner can the goal of full compensation be achieved for American passengers.

The Victims Families' Associations strongly urge that the Department require that the waiver of the monetary limit be on the entire amount of compensation or, if a two-tiered approach is approved, to insure that American citizens and residents have access to American courts.

Also, if the DOT approves a two-tiered source of liability, i.e., the carrier waives its Article 20(1) defenses for the first amount of recovery, but retains the Article 20(1) defense for any excess, the Victim Families' Associations suggests that the cut-off point be 250,000 SDRs. Specifically, the Victim Families' Associations suggest that the carriers be required to waive their Article 20(1) defenses for recoveries up to 250,000 SDRs while retaining its Article 20(1) defense in excess of 250,000 SDRs, but only if the Department accepts a two-tiered system of recovery. The amount of 250,000 SDRs is approximately the present value of the \$75,000 limit established under the Montreal Agreement in 1966 when increased by inflation using acknowledged economic indicators from the International Monetary Fund.<sup>4</sup>

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<sup>4</sup> The fact that 250,000 SDRs is approximately the equivalent of \$75,000 in 1966 dollars is further support for the argument that the Department should either require full waiver of Article 20(1)

The Victim Families' Associations also feel that it is important if the two-tier approach is accepted by the Department that the Department acknowledge the historic change in the value of money by requiring that the tier cut-off (i.e., 250,000 SDRs) be increased on an annual basis by an economic indicator that equivalates the value of future funds to the present day 250,000 SDRs.

C. Paragraph II(1)

This paragraph permits the passenger, at his option, to prevent the carrier from arguing that the law of the domicile of the passenger may be applied to establish recoverable compensatory damages. The Victims Families' Associations support the principle but suggest that it does not go far enough. It only has substantial validity if it is combined with a fifth jurisdiction under Article 28 permitting a United States citizen or permanent resident to sue in the United States any carrier against which personal jurisdiction can be obtained in the United States.

As to American passengers, the allowance of the law of domicile is an empty gesture if American damages law is interpreted by courts unfamiliar with the common law as applies in the United States, as are courts in most of the countries worldwide. There is also a serious possibility that foreign courts interpreting American law would use the process to engage in anti-American activities to the detriment of the American passenger. It is

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defenses or require venue in American courts for American citizens. Otherwise, there is not real advantage to the passengers under the IATA Application.



unquestioned that almost 75% of the world's population live in countries with significantly lower, or non-existent, standard of compensation for death and injury than the United States. It would be foolish to ignore that many countries have endemic corruption and xenophobic attitudes, especially against more progressive countries. Therefore, the carriers' agreement not to oppose application of domiciliary law must be combined with venue jurisdiction in the United States for it to have any real significance for American citizens and permanent residents. Moreover, since American carriers can always be sued in the United States as the place of their domicile and principal place of business, it is unlikely that they would raise any serious objection to this venue. Such a provision would also put the international carriers on the same footing as the American carriers vis venue as it relates to American citizens, much as they are for obtaining access to the American market of passengers.

#### D. OTHER PROVISIONS

The Victims Families' Associations take no position relative to the other provisions or the request for antitrust immunity.

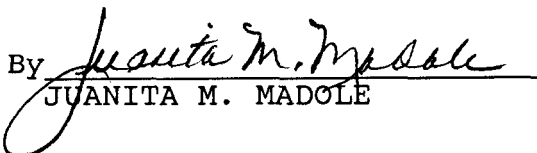
# CONCLUSION

For the reasons stated specifically herein, the Department should require mandatory provisions in accordance with the issues discussed.

Dated: August 22, 1996

Respectfully submitted

SPEISER, KRAUSE, MADOLE & COOK

By   
JUANITA M. MADOLE

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Response of the Victims Families' Associations to the Application of the Air Transport Association of America for Approval of Agreement, Antitrust Immunity and Related Exemption Relief and Motion for Leave to File a Late Pleading** was mailed on August 22, 1996, to the parties listed on the attached Service List.

  
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